

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jeanine R. Brand,

Complainant,

vs.

Richard C. Mollin,

Respondent.

ORDER FINDING
NO PRIMA FACIE VIOLATION AND
DISMISSING COMPLAINT

TO: Parties.

On February 22, 2011, Jeanine Brand filed a Campaign Complaint with the Office of Administrative Hearings alleging that Richard Mollin violated Minnesota Statutes §§ 211B.02, 211B.04, 211B.06, 211B.11, and 211B.13 during the course of his campaign for the position of Clearwater County Attorney.

The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on February 22, 2011, pursuant to Minn. Stat. § 211B.33. A copy of the Complaint was sent by United States mail to the Respondent on February 22, 2011.

After reviewing the Complaint and the attached documents, and for the reasons set out in the attached Memorandum, the Administrative Law Judge finds that the Complaint fails to set forth a *prima facie* violation of the Fair Campaign Practices Act.

ORDER

IT IS ORDERED:

That the Complaint filed by Jeanine R. Brand against Richard C. Mollin is **DISMISSED**.

Dated: February 25, 2011

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Complainant, Jeanine Brand, is the former Clearwater County Attorney. She lost re-election in November 2010 to the Respondent, Richard C. Mollin. Ms. Brand received approximately 38 percent of the vote and Mr. Mollin received approximately 62 percent of the vote.

The Complainant maintains that Mr. Mollin violated several provisions of the Fair Campaign Practices Act during the course of his campaign. Specifically, Ms. Brand contends that Mr. Mollin violated Minn. Stat. §§ 211B.02 (false endorsement), 211B.04 (disclaimer), 211B.06 (false campaign material), 211B.11 (election day prohibitions), and 211B.13 (bribery).

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.¹ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.² A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.³

The Administrative Law Judge will address each of the Complainant's allegations below.

Minn. Stat. § 211B.02

Minn. Stat. § 211B.02 provides in relevant part as follows:

211B.02 False Claim of Support.

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party unit or of an organization.

The Complainant asserts that the Respondent violated Minn. Stat. § 211B.02 by strategically posting his campaign lawn signs alongside signs for various Republican

¹ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

² *Id.*

³ *Id.*

candidates to give the false impression that he was endorsed by the Republican Party. The Complainant points out that the Clearwater County Attorney position is non-partisan and, as far as she knows, Mr. Mollin was not endorsed by the Republican Party. The Complainant also alleges that Mr. Mollin failed to get permission from landowners before posting his signs on their property.

The statute prohibits a candidate from falsely stating or implying that he has the endorsement or support of a major political party. The mere fact that Mr. Mollin may have placed his campaign lawn signs alongside groups of signs for Republican endorsed candidates is not sufficient to support a finding that Mr. Mollin falsely implied that he was endorsed by the Republican Party. In addition, because Minn. Stat. § 211B.02 is a criminal statute,⁴ the rule of strict construction of penal statutes applies notwithstanding the civil nature of the proceedings before the Administrative Law Judge.⁵ With that in mind, the Administrative Law Judge concludes that § 211B.02 cannot be read so broadly as to prohibit a candidate from merely placing his or her signs in proximity to those of candidates who have been endorsed by a political party. The Complainant has failed to allege facts to support finding a *prima facie* violation of Minn. Stat. § 211B.02 on the part of Mr. Mollin. This allegation is dismissed.

As for the Complainant's assertion that Mr. Mollin failed to get property owners' permission before posting his campaign signs, there is no provision within Chapter 211B that addresses this concern and the Complainant has not cited to any provision. It is possible that this conduct, if true, may violate the Minnesota Outdoor Advertising Control Act, Minn. Stat. § 173.15, which prohibits the posting of advertising devices on private land without consent of the owner. However, enforcement of that statute is within the jurisdiction of the Minnesota Department of Transportation and not the Administrative Law Judge. Accordingly, this allegation is also dismissed.

Minn. Stat. § 211B.04

The Complainant alleges that, prior to the August 2010 primary the Respondent distributed promotional tote bags to potential voters imprinted with the following message:

Take your tote
to the polls and
Vote
Rick Mollin
County Attorney
Aug 10 Primary Election
Nov 2 General Election⁶

A sticker on the tote stated: "Prepared and paid for by the Candidate."

⁴ Minn. Stat. § 211B.19 provides that a violation of chapter 211B for which no other penalty is provided is a misdemeanor.

⁵ *In the Matter of the Contest of General Election [Graves v. Meland]*, 264 N.W.2d 401, 403 (Minn. 1978).

⁶ The Complainant enclosed a tote with her campaign complaint.

“Campaign material” is defined, in part, as “any material that is disseminated for the purposes of influencing voting at a primary or other election.”⁷ The tote bag meets the definition of campaign material. Minnesota Statutes § 211B.04 requires campaign material to include the name and address of the person or committee causing the material to be prepared or disseminated. The disclaimer is required to read *substantially* as follows: “Prepared and paid for by the _____ committee _____ (address) in support of _____ (insert candidate’s name).”⁸

In this case, the tote bag included a disclaimer that it was prepared and paid for by the Candidate, but it failed to include an address. The issue is whether Mr. Mollin’s disclaimer substantially complies with the disclaimer requirement. The purpose of the disclaimer requirement is to “identify who or what committee prepared, disseminated and paid for the campaign material.”⁹ In *Hansen v. Stone*,¹⁰ an OAH panel held that a candidate’s campaign fliers that contained a disclaimer providing that the candidate’s committee prepared and paid for the material, but listed only an email address substantially complied with the disclaimer requirement.

The Administrative Law Judge finds that Mr. Mollin substantially complied with the disclaimer requirement despite the lack of an address. The disclaimer on the tote bag identifies Mr. Mollin as the person who prepared and paid for the tote. Voters in Clearwater County were no doubt familiar with the two candidates for county attorney and could easily locate a campaign website or other address for Mr. Mollin if they so desired. This allegation is dismissed.

Minn. Stat. § 211B.11

The Complainant further alleges that by encouraging voters to take the tote bag with them to the polling place, the Respondent violated Minn. Stat. § 211B.11, which prohibits soliciting votes at or near the polling place on primary or election day.

Minn. Stat. § 211B.11, subd. 1 provides, in relevant part as follows:

Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section

⁷ Minn. Stat. § 211B.01, subd. 2.

⁸ Minn. Stat. § 211B.04 (2010).

⁹ *Hansen v. Stone*, OAH Docket No. 4-6326-16911 (Oct. 28, 2005) at 4.

¹⁰ *Id.*

applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

Minnesota Statutes § 211B.11 is entitled “Election Day Prohibitions” and is directed primarily at election-day campaigning. It prohibits persons from displaying campaign material, posting signs, or in any manner trying to induce or persuade voters within a polling place or within 100 feet of a building in which a polling place is situated to vote for or against a candidate or ballot question on primary or general election day. The statute also applies in a more limited fashion to the immediate areas set aside for absentee voting.

Polling place “campaign-free” zones implicate three central concerns in First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of speech.¹¹ A restriction of any of those forms of speech requires strict scrutiny of the constitutionality of that restriction. That means that the restriction has to serve a compelling state interest; has to be narrowly tailored to serve that interest; and has to be the least restrictive means of achieving that interest.¹² Courts have found that states have a compelling interest in maintaining the integrity of the voting place and preventing voter intimidation and election fraud, and have concluded, for example, that 100 foot campaign-free boundaries are narrowly tailored to achieve that interest even though they restrict speech in “quintessential public forums,” such as sidewalks and streets.¹³

Although Section 211B.11 states that a person may not *provide* political badges, political buttons, or political insignia *to be worn* at or about the polling place on election day, the statute is directed at conduct on election day. A violation of the statute occurs only when and if a person displays campaign material or wears a political badge or insignia at or near the polling place on election day. Only then may the person who provided the political material to be worn at the polling place on election day be found to have violated the statute. To hold, as the Complainant argues, that the Respondent violated the statute by providing campaign material to others *in anticipation* that they will display or wear it on election day, amounts to a prior restraint on future conduct and expression.¹⁴

The Complainant has alleged only that the Respondent provided campaign material to be displayed or worn at or near the polling place on election day, not that a violation occurred at a polling place on the day of the primary or general election. The Administrative Law Judge concludes, that the Complainant has failed to put forward sufficient facts to support a *prima facie* violation of Minn. Stat. § 211B.11 by the Respondent and this claim is dismissed.

¹¹ *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

¹² *Burson*, 504 U.S. at 198.

¹³ *Burson*, 504 U.S. at 210.

¹⁴ Any prior restraint of speech is reviewed bearing a heavy presumption against its constitutional validity. *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 435 (Minn. App. 1985) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639 (1963)).

In a separate allegation, the Complainant asserts that the Respondent violated Minn. Stat. § 211B.11 by wearing a political button promoting his candidacy while making a scheduled court appearance on behalf of a client at the Clearwater County Courthouse on October 19, 2010. The Complainant points out that the Clearwater County Courthouse is a polling place. Absentee voting occurs in the County Auditor's office, which is also located in the courthouse building. The Complainant argues that, by wearing his political button within a polling place, the Respondent violated Minn. Stat. § 211B.11.

Section 211B.11 also applies to areas set aside for absentee voting as provided in chapter 203B. It appears that this portion of the statute is not limited to the primary and general election days. However, Chapter 203B, which is referenced in the relevant section, prohibits individuals from intentionally soliciting the vote of an absentee voter while in the "immediate presence of the voter during the time the individual knows the absentee voter is voting."¹⁵ There is no allegation in the Complaint that the Respondent was in the County Auditor's office on October 19, 2010, within the immediate presence of an individual voting absentee and acted in a manner to induce that voter to vote for him. The Complainant has failed to allege a *prima facie* violation of Minn. Stat. § 211B.11 with respect to this allegation and it is therefore dismissed.

Minn. Stat. § 211B.13

The Complainant also alleges that by distributing the tote bag to potential voters, the Respondent violated Minn. Stat. § 211B.13.

Minnesota Statutes § 211B.13 provides as follows:

A person who willfully, directly or indirectly, advances, pays, gives, promises, or lends any money, food, liquor, clothing, entertainment, or other thing of monetary value, or who offers, promises, or endeavors to obtain any money, position, appointment, employment, or other valuable consideration, to or for a person, in order to induce a voter to refrain from voting, or to vote in a particular way, at an election, is guilty of a felony. This section does not prevent a candidate from stating publicly preference for or support of another candidate to be voted for at the same primary or election. Refreshments of food or nonalcoholic beverages having a value up to \$5 consumed on the premises at a private gathering or public meeting are not prohibited under this section.¹⁶

Minnesota Statutes § 211B.13 is an anti-bribery statute. It prohibits giving something of monetary value or promising something of "valuable consideration" to a

¹⁵ Minn. Stat. § 203B.03, Subd. 1(h).

¹⁶ The last sentence was amended in 2005 as follows:

Refreshments of food or nonalcoholic beverages ~~of nominal having a value up to \$5~~ consumed on the premises at a private gathering or public meeting are not prohibited under this section.

Minn. Laws 2005, ch. 156, art. 6, sec. 63.

person in order to induce a voter to vote in a particular way at an election. The Complainant contends that the tote bag Respondent distributed to potential voters while door-knocking or following speaking engagements “is of monetary value, and is a bribery of voters.”¹⁷

An assessment of the monetary worth of an item should be made from the perspective of a voter receiving the item, not the person offering it.¹⁸ Whether the distribution of items to voters is a violation of this section is a question of fact.¹⁹ In prior decisions, Administrative Law Judges have held that tossing penny candy at a parade and giving notepads imprinted with the candidate’s name and office did not violate Minn. Stat. § 211B.13, but that one candidate providing chicken dinners to residents at a senior housing complex after a candidates’ forum did violate Minn. Stat. § 211B.13.²⁰

The Administrative Law Judge concludes that the tote bag at issue in this case does not constitute a “thing of monetary value” within the meaning of the statute. Notice is taken that such bags are typically sold for less than \$5, which is the amount the Legislature established for determining whether a refreshment is a thing of monetary value. In addition, there is no evidence of any “inducement” of anyone to vote a particular way by offering the tote bag. The value of the bag was too nominal to create an inducement or obligation on the part of the recipient to vote for Mr. Mollin and Complainant has put forward no evidence that the tote bags were accepted under those terms. This claim is dismissed.

In a separate allegation, the Complainant asserts that the Respondent promised a woman that he would “dismiss her maltreatment appeal” if elected. Although the Complaint does not specifically identify § 211B.13 as the provision violated, it is presumed that the Complainant is asserting that the Respondent made this statement to induce the woman to vote for him. The Administrative Law Judge finds that the Complainant has failed to allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.13 with respect to this allegation. It is unclear what, if any, authority a County Attorney would have to “dismiss a maltreatment appeal.” As a result, it is uncertain what, if any, value such a promise would have to the woman. Moreover, the Complainant has not alleged specifically that the Respondent made this statement to induce the woman to vote for him. This allegation is dismissed.

Minn. Stat. § 211B.06

¹⁷ Complaint at 2.

¹⁸ *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983) (under federal statute prohibiting payment for votes, an assessment of the monetary worth of an item should be made from the perspective of a voter receiving the item, not the person offering it).

¹⁹ See, Op. Atty. Gen. 627F-1, March 7, 1950 (interpreting predecessor statute) (whether the distribution of objects such as matchbooks, pencils, emery boards, etc., is a violation of this section is a question of fact).

²⁰ See *Kalil v. Knutson*, OAH Docket No. 3-6302-16119-CV (Order Denying Reconsideration, September 2, 2004); *Schauer v. Gillaspie*, OAH Docket No. 3-6371-17570-CV (Order of Dismissal dated October 11, 2006); *OAH Wyckoff and Laine v. Peterson and Williams*, OAH Docket No. 7-6301-16405-CV (Order dated April 25, 2005).

The Complainant alleges that the Respondent violated Minn. Stat. § 211B.06 during a radio interview by misrepresenting the facts of two controversial criminal cases that she prosecuted as Clearwater County Attorney. The Complainant asserts essentially that the Respondent portrayed the Complainant as misguided and overzealous in prosecuting an elderly Bagley farmer who chained his Alzheimer's-afflicted wife to a chair to prevent her from wandering, as well as a woman who permitted her 6-year-old child to handle a firearm without adequate supervision. (The child shot herself in the foot.) The Complainant maintains that the Respondent smeared her character by implying that she used poor judgment in advising county employees with respect to these cases. According to the Complainant, the Respondent's misrepresentations regarding these cases had a major effect on the voting public.

Minn. Stat. § 211B.06 provides in relevant part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated Minn. Stat. § 211B.06, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election."²¹

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.²² Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.²³ Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.²⁴

²¹ Minn. Stat. § 211B.01, subd. 2.

²² *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

²³ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

²⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the advertisement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.²⁵ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.²⁶

The Complainant’s allegation that the Respondent violated Minn. Stat. § 211B.06 with respect to statements he made during an interview on the radio fails for several reasons. First, the definition is limited to written material. Oral statements (other than paid political advertising) such as those made by the Respondent on a radio program fall outside of the definition and cannot form the basis of a claim under Minn. Stat. § 211B.06.²⁷ Second, the Complainant has failed to identify the exact statements she claims were factually false. Instead, she alludes generally to misrepresentations and states that the Respondent implied falsely that she had placed the elderly woman in a nursing home and attempted to take away the license of the mother of the wounded child.²⁸ The Complainant asserts that the elderly woman was sent to the hospital emergency room, not a nursing home, and that she lacks the authority to revoke licenses.

Misrepresentations regarding facts of criminal cases are not statements that refer to the character or conduct of the Complainant. Moreover, the statute does not bar unfavorable criticisms or deductions even if misleading, unfair or incomplete.²⁹ Absent some evidence that a particular statement was demonstrably factually false, concerned the Complainant’s character or acts, and was disseminated with a high degree of awareness of its probable falsity, the claim fails to allege a *prima facie* violation of Minn. Stat. § 211B.06 and must be dismissed.

For the reasons above, the Complaint is dismissed in its entirety.

B.L.N.

²⁵ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).

²⁷ See, *Stegner v. Smith*, 2008 WL 2967011 at *4 (Minn. App.) (concluding that oral statements do not constitute “campaign material” within the meaning of § 211B.01); *Stegner v. Smith, et al*, OAH Docket No. 11-6381-19135-CV (2007); *Koalska v. Juneau*, OAH Docket No. 7-6312-16225-CV (2004).

²⁸ The Complainant does not identify the type of license held by the woman.

²⁹ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

